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v.

DATO' SERI ANWAR IBRAHIM & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR

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ARIFIN JAKA J

[CRIMINAL TRIALS NO: 45-51-98 & 45-26-99]

21 APRIL 2000

[2000] CLJ JT(4)

CRIMINAL PROCEDURE: *Witness - Examination of witness - Calling of witness by defence - Subpoena - Whether prosecution could object to subpoena - Whether proposed evidence irrelevant - Whether subpoena to be set aside - Whether court could consider relevancy of evidence before proposed witness began to testify - Evidence Act 1950, s. 136(1)*

c

EVIDENCE: *Witness - Calling of witness by defence - Whether proposed evidence irrelevant - Whether subpoena to be set aside - Evidence Act 1950, s. 136(1)*

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The defence in these two cases had subpoenaed Dato' Seri Dr Mahathir bin Mohamad, the Prime Minister of Malaysia ('Dr Mahathir'), to attend court and give evidence as a witness. It was contended by the defence, *inter alia*, that Dr Mahathir's evidence is relevant as it could go to: (i) establish one of the defences of the accused, ie that there was a conspiracy to fabricate evidence of sodomy as alleged in the charges; (ii) test the credibility of a witness ('Azizan'), as Azizan had alleged that he had been sodomised by the first accused and had intimated the alleged sodomy to Dr Mahathir; and (iii) explain Dr Mahathir's change of attitude towards the first accused, as Dr Mahathir had made public statements in the local press that the allegations against the first accused were without basis, malicious and baseless. The prosecution had objected to the subpoena on the ground that the proposed evidence is irrelevant, and in the circumstances had invited the court to make a ruling on the issue under s. 136(1) of the Evidence Act 1950 ('the Act').

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Held:

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[1] The Public Prosecutor has the *locus standi* to object even though no application has been filed by Dr Mahathir to set aside the subpoena. Section 136 of the Act becomes operative when the court is alerted by any party in the proceeding. The Public Prosecutor is a party in the proceeding and has every right to raise the objection.

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- a* [2] The court has the power under s. 136 to ask the party proposing to give evidence of a fact in what manner the alleged fact, if proved, would be relevant. The word “proposes” in the section contemplates that the power could be exercised even before a proposed witness gives his evidence.
- b* [3] There is no procedure laid down in the Criminal Procedure Code to be followed in establishing the relevancy of the proposed evidence for the purpose of s. 136 of the Act. Hence, the party proposing to give evidence may either address the court from the Bar or resort to affidavits.
- c* [4] Dr Mahathir in his affidavit had referred to what Azizan had told him, *ie*, on how the latter was sodomised the first time by the first accused. This is evidence given on oath by a witness intended to be called by the defence and what he said is crystal clear and needs no further clarification. In any event, the revelation is highly prejudicial to the accused and being hearsay would be inadmissible. Azizan has given evidence on the sodomy allegations and his credibility can be assessed on that evidence and the evidence of other witnesses. It will thus serve no useful purpose to call Dr Mahathir to testify on this point.
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- e* [5] Dr Mahathir has not denied to making the public statements as alleged. Dr Mahathir has however explained the statements *vide* para 5 of his affidavit and this court accepts the explanation. Dr Mahathir is entitled to form his own opinion in this respect, but the opinion is irrelevant as the court has to decide the ingredients in the charges on evidence and not on the opinion of a witness. It is a futile exercise to call Dr Mahathir to give evidence on this issue which is irrelevant.
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- g* [6] There is no evidence to show that Dr Mahathir is involved in any political conspiracy, let alone evidence to fabricate evidence against the first accused. Any conspiracy to topple Dato’ Seri Anwar, in any event, is not relevant in this trial.
- h* [7] The point pertaining to the first accused’s allegation that Dr Mahathir had a drastic change of attitude towards him because the latter was suspicious of being challenged by him for the UMNO Presidency in 1999 is irrelevant. The removal of the first accused as Deputy Prime Minister and Deputy President of UMNO is clearly an issue which is not relevant in this trial. That aside, the calling of Dr Mahathir to give evidence may also lead to indecent questions or questions intended to insult or annoy be asked. In any event, this allegation was answered by Dr Mahathir in para 15 of his affidavit. The answer is explicit and needs no further clarification.
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[8] The second accused has not in any way implicated Dr Mahathir and there is no evidence to show that Dr Mahathir knows or is acquainted with him. The second accused has not shown that Dr Mahathir could give evidence to prove facts which are relevant to his defence. The defence, in the circumstances, has not satisfied the court on the relevancy of the evidence that Dr Mahathir could possibly offer to them. To call Dr Mahathir to testify is a waste of time and will serve no useful purpose.

[Subpoena set aside.]

Case(s) referred to:

Habeeb Mohamad v. State of Hyderabad AIR [1954] SC 51 (refd)

Ismail v. Hasnul & Abdul v. Hasnul [1968] 1 MLJ 108 (refd)

PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 1 215 (refd)

PP v. Lam Peng Hoa [1996] 3 CLJ 747 (refd)

Ronald Wood Matham & Ors v. State of West Bengal AIR [1954] SC 455 (refd)

The King v. Baines [1909] 1 KB 258 (refd)

Wong Sin Chong & Anor v. Bhagwan Singh & Anor [1993] 4 CLJ 345 (refd)

Legislation referred to:

Criminal Procedure Code, s. 425

Evidence Act 1950, s. 136(1)

For the prosecution - Dato' Abdul Gani Patail (Dato' Azahar Mohamed, Tun Majid, Nordin Hassan & Shamsul Sulaiman with him) DPPs

For the 1st accused - Karpal Singh (Christopher Fernando, Pawancheek Marican, Zulkifli Nordin, SN Nair with him); M/s Ariff Rizal Christopher Fernando & Co

For the 2nd accused - Gobind Singh Deo; M/s Karpal Singh & Co

Watching brief for Tun Daim Zainuddin & Dato' Abdul Aziz Shamsuddin - Ng Aik Guan

Reported by WA Sharif

JUDGMENT

Arifin Jaka J:

Ruling On Whether Dato' Seri Dr Mahathir Mohamad Is To Attend Court To Give Evidence

Dato' Seri Dr Mahathir bin Mohamad, the Prime Minister (Dr Mahathir) is required to give evidence for the defence at this trial. A subpoena has accordingly been issued and served on Dr Mahathir at the request of the counsel for Sukma Darmawan Sasmitaat Madja (the 2nd accused). The learned counsel for Dato' Seri Anwar Ibrahim (the 1st accused) has also

- a* applied for a subpoena which is yet to be issued. For the purpose of this ruling as agreed by the learned counsel for the 1st accused the subpoena is deemed to have been served on Dr Mahathir.

- b* The learned Senior Deputy Public Prosecutor, Datuk Gani Patail (the DPP) raised an objection to the calling of Dr Mahathir to appear in court as a witness and invited the court to make a ruling under s. 136(1) of the Evidence Act 1950 (the Act) which reads:

- c* When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the court shall admit the evidence if it thinks that the fact, if proved, would be relevant, and not otherwise.

- d* Encik Karpal Singh on behalf of the 1st accused raised a preliminary objection and submitted that the DPP has no *locus standi* to raise the objection. The procedure is that the person who has been served with the subpoena, that is in this case Dr Mahathir, has to make an application to set aside the subpoena.

- e* It is to be noted that there is no specific provision in the Criminal Procedure Code dealing with the procedure to set aside a subpoena which has been served on a person to attend court to give evidence. In practice the person who has been served with a subpoena either in a civil or criminal proceeding may apply to court to set it aside. (See *Wong Sin Chong & Anor v. Bhagwan Singh & Anor* [1993] 4 CLJ 345; [1993] 3 MLJ 675, *The King v. Baines* [1909] 1 KB 258 and *Ismail v. Hasnul and Abdul Ghafar v. Hasnul* [1968] 1 MLJ 108.)

- f* It was contended by the defence that since Dr Mahathir has not made an application to set aside the subpoena, the DPP has no *locus standi* to raise the objection in this case. With respect I do not agree with this contention. In my understanding it is clear that s. 136 does not require any application to be made before it is invoked. I am of the view this section becomes operative when the court is alerted by any party in the proceeding.
- g* In the instant case the Public Prosecutor is a party in the proceedings and the DPP who appears on behalf of the Public Prosecutor has every right to raise the objection on the authority of *Wong Chang's* case (*supra*). In that case the application to set aside the subpoena was not made by the person who had been served with it. It was made by the plaintiff. Similarly in this instant case the DPP being a party in the proceedings has the right to raise the objection and therefore has the *locus standi* even though no application has been filed by Dr Mahathir.

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Encik Karpal further contended that s. 136(1) is under Chapter 10 of the Act which concerns the Examination of Witness. It is therefore prematured to invoke this section at this stage. It should be invoked when an objection as to relevancy of evidence is raised when the witness takes the stand in the witness box and only then the judge would have to consider the objection and make a ruling on the admissibility of the evidence. Is this the correct approach in interpreting this section? To me a proper reading of the section does not warrant the approach as advocated. It is clear to me the court has the power under this section to ask the party who proposes to give evidence of any fact in what manner the alleged fact, if proved, would be relevant. The preliminary question that has to be considered is whether the power can be exercised by the court before a proposed witness begins to give evidence. The word 'proposes' used in the section clearly contemplates that the court can exercise the power before a proposed witness gives evidence.

I totally agree with the reasons given and the conclusion arrived at by Datuk Augustine Paul J in respect of the exercise of the power vested in the court under s. 136(1) in *Public Prosecutor v. Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at 170 where he said:

A matter of critical importance is whether this power can be exercised by the court before a proposed witness begins to give evidence. In my opinion, the language employed in the sub-section clearly contemplates the exercise of the power at that stage as it empowers the court to inquire from a party '... in what manner the alleged fact, if proved would be relevant ...' when a party '... proposes to give evidence of any fact ...' and to admit the evidence only if it finds it to be relevant. The word 'proposes' means the court can exercise the power given by the sub-section when a party wishes to call a witness, that is to say, before a proposed witness begins to give evidence.

On this premise I am of the view that the power of the court to consider the relevancy of the evidence can be exercised before the proposed witness begins to give evidence.

The learned counsel for the second accused adopted the submission of Encik Karpal Singh and urged the court to rule in favour of the preliminary objection.

After carefully considering the submissions of counsels and for reasons which I had stated above I rule the preliminary objection by the defence is devoid of merit and is dismissed.

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- a* Having made the ruling I now proceed to ascertain the relevancy of the evidence which the defence proposes to give by calling Dr Mahathir as a witness.

- b* Section 136 of the Evidence Act 1950 gives the discretion to the court to ask the party proposing to give evidence of any fact in what manner the alleged fact, if proved would be relevant, and the court shall admit the evidence if it thinks that the fact, if proved would be relevant, and not otherwise. It is the contention of the defence Dr Mahathir can give material and relevant evidence to establish one of the defences of both the accused namely a conspiracy to fabricate evidence of sodomy as alleged in the charges. The question which the court has to enquire is whether the evidence to be adduced by Dr Mahathir is relevant.

- c* Both the accused filed affidavits to show the relevancy of the proposed evidence to be adduced. The learned Deputy Prosecutor Datuk Gani Patail took exception to the procedure adopted by the defence and contended that the proper procedure is for the defence counsel to give the substance of the proposed evidence to the court and not by way of affidavits. The reason advanced to support this contention is that the affidavits will form part of the record and contain a lot of allegations which is scandalous in nature.
- d* In support of this contention Datuk Gani Patail referred to *PP v. Lam Peng Hoa* [1996] 3 CLJ 747; [1996] 5 MLJ 405. With due respect this case is not applicable as in that case the affidavit was used to supplement the oral evidence which has already been given by the Chemist. The case of *PP v. Anwar bin Ibrahim* [1999] 2 CLJ 215; [1999] 2 MLJ 1 is also referred to support the contention that the proper procedure is for the counsel to explain to the court the substance of the evidence. I am of the view, with greatest respect, that there is no procedure laid down in the Criminal Procedure Code to be followed in establishing the relevancy of the proposed evidence for the purpose of s. 136 of the Evidence Act 1950. I am therefore of the opinion that the counsel for the party proposing to give the evidence may either address the court from the Bar as what was done in *PP v. Dato' Seri Anwar* or resort to affidavits as in the instant case.

- e* Before embarking on the determination of the question of the relevancy of the proposed evidence, I wish to state that the proposition of law that a conviction is bad if the accused is not given the opportunity to examine their witnesses (see *Ronald Wood Matham and Others v. State of West Bengal* AIR [1954] SC 455) and a conviction arrived at without affording an opportunity to the defence to produce relevant evidence cannot be sustained (see *Habeeb Mohamad v. State of Hyderabad* – AIR [1954] SC 51) is in the forefront of mind.

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I shall now proceed to consider whether the proposed evidence to be adduced from Dr Mahathir of facts that are relevant. Encik Karpal Singh on behalf of the 1st accused raised a number of points to support the contention that Dr Mahathir is a material witness. Encik Karpal started by saying that the affidavit in reply of the Prime Minister clearly shows that he is a material witness who ought to be called by the prosecution. He even went further to suggest that even if the prosecution thought it fit not to call Dr Mahathir for reasons best known to the prosecution then it is the duty of the court to call him as a court witness under s. 425 of the Criminal Procedure Code. I see no merit in this argument as the question of invoking s. 425 does not arise as Dr Mahathir has been served with a subpoena to appear in court by the defence. The issue at hand is whether the proposed evidence to be adduced is material to prove a fact which is relevant. It is to be noted that Dr Mahathir as a Prime Minister ought to make no difference and should not be considered as a factor in determining whether he should attend court to give evidence. In the case of *Ismail v. Hasnul & Abdul Gafar v. Hasnul* [1968] 1 MLJ 108, Raja Azlan Shah J (as His Majesty then was) said on this issue at p. 110.

The practice in all courts has been that a subpoena may be issued against anybody, be he a Minister of the Government or a nonentity. It cannot be gainsaid that a Minister has any more privilege than that enjoyed by a member of the public. Injustice will arise if equals are treated unequally. But the court possesses inherent jurisdiction to see that the privilege is properly exercised and in a proper case can restrain the abuse.

(See also *R v. Baines* 25 TLR 79).

In deciding the issue at hand I treat Dr Mahathir just like any other citizen of this country without any privilege as far as the attendance in court as a witness is concerned.

Having said that I shall now proceed to consider the other points raised by Encik Karpal which I think are relevant. The next point raised is with regard to the evidence that Azizan met the Prime Minister. Encik Karpal referred to para. 4 of Dr Mahathir's affidavit in reply the relevant part of which states:

Azizan Abu Bakar menceritakan bagaimana kali pertama ia diliwat apabila Dato' Seri Anwar datang ke bilik nya dan menyuruh ia mengurut badannya.

It is submitted that this must be taken in the light of the withdrawal of the allegations by Azizan and it is relevant to show that Azizan is capable of giving different version.

- a* It cannot be denied that Dr Mahathir refers to what Azizan told him how he was sodomised the first time by the 1st accused. This is evidence given on oath by a witness intended to be called by the defence and what he said is crystal clear and needs no further clarification. In any event this revelation is highly prejudicial to the accused and would not be admissible
- b* being hearsay, at any cost. It is also contended that this is relevant to test the credibility of Azizan Abu Bakar. Azizan has given evidence on the sodomy allegations and his credibility can be assessed on that evidence and on the evidence given by the other witnesses. For this reason it will serve no useful purpose to call Dr Mahathir to testify on this issue.
- c* Another issue raised by Encik Karpal is the evidence given by the 1st accused himself in connection with the letter dated 5 Ogos 1997 written by Umi Hafilda to the Prime Minister who asked the 1st accused to ignore the allegations therein and to read and destroy; and evidence that
- d* “Cawangan Khas telah membuat laporan kepada Perdana Menteri sebagai Menteri Dalam Negeri bahawa tuduhan-tuduhan itu tidak ada asas.” It is submitted by En. Karpal that it is relevant to call the Prime Minister and to find out from him why at that time he agreed with the conclusion that the allegations against the 1st accused is without basis. Dr Mahathir has provided with the answer to this question in his affidavit where he says
- e* in para. 8:
- (i) Saya tidak percaya kepada isi kandungan surat yang ditandatangani oleh Umi Hafilda bertarikh 5 Ogos 1997 kerana pada masa itu saya masih percaya Dato’ Seri Anwar adalah orang yang warak dan tidak mungkin melakukan perbuatan yang amat jijik dan kotor seperti yang
- f* dinyatakan dalam surat tersebut. Oleh sebab itulah apabila saya menyerahkan surat itu kepada Dato’ Seri Anwar saya menasihatkan supaya Dato’ Seri Anwar ‘ignore such irresponsible and malicious allegations’ dan ‘read and destroy’.
- (ii) Pada masa saya menerima surat/laporan daripada Dato’ Said Awang, Pengarah Cawangan Khas dan surat-surat daripada Umi dan Azizan bertarikh 18 Ogos 1997 saya tidak tahu yang Dato’ Seri Anwar telah menyuruh Dato’ Said Awang supaya menggempar dan memaksa Umi dan Azizan menarik balik surat asal mereka. Jika saya tahu saya tidak akan percaya atau sekurang-kurangnya meragui laporan Dato’ Said
- g* Awang dan penarikan balik tuduhan oleh Umi dan Azizan.
- h* As the answers are clear and unequivocal it is not necessary for Dr Mahathir to appear in court to give evidence on the issue.
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In addition to the issues which had been raised and which I have considered above the 1st accused also deposed in his affidavit in para. 9, 11, 12 and 15 that Dr Mahathir made public statements in the local press that allegations made against the 1st accused are without basis, malicious and baseless. These statements are not denied by Dr Mahathir and he explains in para. 5 of his affidavit in reply that:

Kenyataan-kenyataan itu dibuat sebelum saya mendapat bukti yang jelas akan salah laku seks luar tabii Dato' Seri Anwar Ibrahim. Sesungguhnya saya membuat kenyataan itu semata-mata kerana saya mempunyai penuh kepercayaan kepada Dato' Seri Anwar yang saya percaya adalah seorang yang warak dan berpegang teguh kepada ajaran Islam. Tuduhan yang dibuat terhadap Dato' Seri Anwar di waktu itu amat bertentangan dengan imej yang telah dipertunjukkan olehnya semasa saya mengenalinya. Tetapi hasil penyiasatan polis dan pengakuan yang dibuat oleh mereka yang terlibat kemudiannya meyakinkan saya bahawa tuduhan-tuduhan salahlaku seks yang dibuat terhadap Dato' Seri Anwar adalah benar dan saya tersilap besar berkenaan dengan Dato' Seri Anwar dan telah membuat kenyataan media itu semata-mata berdasarkan kepada persepsi saya terhadapnya pada masa itu.

I accept this explanation as there is evidence before this court that there were two investigations in this case one pursuant to the police report made by ASP Zull Aznam, on the "surat layang" and the second subsequent report by Azmin Ali in connection with the book "50 Dalil Kenapa Anwar Ibrahim tidak boleh menjadi PM". Dr Mahathir is entitled to form his own opinion based on the police investigation pursuant to the reports made. This opinion is irrelevant as the court has to decide the ingredients in the charges on evidence and not on the opinion of a witness, unless of course the witness gives evidence as an expert. Under these circumstances it is a futile exercise to call Dr Mahathir to give evidence on this issue which is not relevant.

The rest of the other allegations made by the 1st accused as contained in his affidavits are not relevant as they relate to political and economic discussions between the 1st accused as a Deputy Prime Minister then and the Prime Minister. There are also allegations of political conspiracy involving political figures but not Dr Mahathir. There is not an iota of evidence or even a suggestion by any witnesses this far to show that Dr. Mahathir is involved in any political conspiracy let alone evidence to fabricate evidence against the 1st accused. In any event conspiracy to topple Dato' Seri Anwar, is not relevant in this trial even assuming that there exists such a political conspiracy. In para. 10 of his affidavit the 1st accused says:

- a** I verily believe that Dr Mahathir has a lot of other information and evidence to prove that I am innocent of the charges preferred against me. Therefore it is important for my defence that Dr Mahathir be brought to court forthwith without any further delay to give evidence.
- b** This is a bare assertion which does not disclose the details of the information and evidence and in what way they are relevant. The details are the very things that should be mentioned in the affidavit for the purpose of s. 136 of the Evidence Act 1950.
- c** Another point that need to be mentioned is the allegations by the 1st accused that Dr Mahathir was suspicious that he may be challenged by him (Dato' Seri Anwar) for the UMNO Presidency in 1999. It is further deposed that Dr Mahathir is to explain why there was drastic change in attitude towards the 1st accused. This is irrelevant. In any event this allegation is answered in para. 15 of Dr Mahathir's affidavit which reads as follows:
- d** Merujuk kepada perenggan 20 Affidavit Anwar, saya mengatakan bahawa walaupun ramai juga yang memberitahu saya bahawa Dato' Seri Anwar akan mencabar saya sebagai Presiden UMNO pada tahun 1999, saya tidak gentar dan menggelisah. Sesungguhnya jika Dato' Seri Anwar mencabar saya, saya yakin UMNO akan menolaknya. Oleh itu tidak ada sebab kenapa saya harus takut akan kemungkinan saya dicabar oleh Dato' Seri Anwar dan dengan itu menukar sikap saya kepadanya. Yang menyebabkan penukaran sikap saya kepada Dato' Seri Anwar ialah bukan kerana saya marah kepadanya, tetapi berasaskan kepada hasil penyiasatan polis yang disampaikan kepada saya berkaitan dengan buku "50 Dalil" dan pengakuan Azizan Abu Bakar kepada saya, saya puashati bahawa Dato' Seri Anwar telah melakukan salahlaku seks luar tabii dengannya. Saya menafikan dakwaan saya terlibat dengan konspirasi untuk menjatuhkan Dato' Seri Anwar. Sesungguhnya saya tidak boleh membenarkan orang yang tidak bermoral seperti itu menjadi Timbalan Perdana Menteri dan bakal pengganti saya sebagai Perdana Menteri. Juga ia tidak layak menjadi Timbalan Presiden UMNO bahkan ahli UMNO.
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- g** The answer is explicit and need no further clarification. To call Dr Mahathir to give evidence on this fact is to my mind tantamount to having a confrontation with your own witness which may lead to indecent questions or questions intended to insult or annoy be asked. In any event the question of the removal of the 1st accused as Deputy Prime Minister and Deputy President of UMNO are issues which are not relevant in this trial.
- h**
- A further point to be noted is that Dr Mahathir states in para. 26 of his affidavit as follows:
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Saya dengan sesungguhnya menyatakan saya tidak pernah pada bila-bila masa memberi arahan kepada atau bersubahat dengan sesiapa untuk mereka apa-apa keterangan untuk menuduh Dato' Seri Anwar melakukan perbuatan liwat terhadap sesiapa pun.

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This assertion hits the nail in the coffin and if your own witness says this it is obvious to me to call him to testify is definitely an abuse of the process of the court and the court has a duty to restrain this abuse. (See *Ismail v Hasnul (supra)*).

b

Now I will consider whether Dr Mahathir ought to appear in court to testify for the 2nd accused. Sukma in his evidence and in his affidavit, which is brief has not in any way implicate Dr Mahathir. There is equally no evidence to show that Dr Mahathir knows or is acquainted with the 2nd accused at all. The 2nd accused has not satisfied me that there is evidence to show that Dr Mahathir can give any evidence to prove any facts which are relevant to his defence.

c

On the available evidence this far produced at this trial and on a careful consideration of submissions of counsels for all parties I find there is no evidence to show or even to suggest that Dr Mahathir was involved in any manner with a conspiracy to fabricate evidence of sodomy against both the accused as alleged by them. I am satisfied that Dr Mahathir if called to testify will not be able to give relevant evidence to assist both the accused. Therefore I come to the inevitable conclusion that the defence has failed to satisfy this court on the relevancy of the evidence that Dr Mahathir could possibly offer to the defence. It is a waste of time and it will serve no useful purpose in calling Dr Mahathir to testify.

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Accordingly for the above reasons the subpoena served on Dr Mahathir is set aside and I rule that Dr Mahathir need not attend court to give evidence for the defence.

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